UNITED STATES
v.
DIANNE GIBSON

IBLA 74-199 Decided July 19, 1974

Appeal from decision (CA 811) of California State Office, Bureau of Land Management, holding millsite null and void.

Set aside and remanded.

Contests and Protests: Generally -- Mining Claims: Contests -- Mining Claims: Millsites -- Rules of Practice: Government Contests

Where a government contest complaint against a millsite contains a charge which, if proved, would render the millsite invalid, and the contestee fails to file an answer to the complaint in accordance with Departmental regulations, the allegations of the complaint will be taken as admitted by the contestee and the millsite is properly declared null and void.

Contests and Protests: Generally -- Mining Claims: Contests

Where a contest complaint merely charges that "[t]he land embraced within the millsite claim is not being used for mining or milling purposes," the charge is not sufficient to invalidate the claim.

Rules of Practice: Government Contests

Where a contestee has responded to an earlier contest notice served only upon her predecessor in interest, her

> answer is deemed sufficient for the contest notice served upon her to which she did not in terms respond.

APPEARANCES: Dianne Gibson, pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Dianne Gibson has appealed from a decision of the California State Office, Bureau of Land Management, dated January 10, 1974, which declared the Boulder Mountain Millsite to be null and void.

The complaint was served on contestee charging that "[t]he land embraced within the millsite claim is not being used for mining or milling purposes."

The State Office decision states that contestee failed to file a timely answer to the complaint and the millsite therefore was declared null and void. This action was taken without a hearing pursuant to 43 CFR 4.450-7(a) which provides; "If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing." Under 43 CFR 4.450-6 contestee was required to file her answer to the complaint "[w]ithin 30 days after service of the complaint * * * in the office where the contest is pending * * *."

The complaint was served on Dianne Gibson on December 4, 1973. No answer was filed before the decision of January 10, 1974.

The contest complaint recited in part as follows:

> NOTICE
>
> This complaint is filed in the California State Office Bureau of Land Management, Room E-2841, Federal Office Building, 2800 Cottage Way, Sacramento, California 95825, and any papers pertaining thereto shall be sent to such office for service on the contestant.
>
> Unless contestee(s) files (file) an answer to the complaint in such office within thirty (30) days after service of this notice and complaint, the allegations of the complaint will be taken as admitted and the case will be decided without a hearing. Any answer should be filed in accordance with Title 43, Code of Federal Regulations, Part 4 (formerly Part 1850) a copy of which is attached. (Circular 2164)
>
> Dated this 28 day of November, 1973

The charge that the land is not being used for mining or milling purposes is not a sufficient basis to invalidate a millsite claim. See United States v. Larsen, 9 IBLA 247 (1973); cf. United States v. Northwest Mine and Milling Inc., 11 IBLA 271 (1973); cf. United States v. Mellos, 10 IBLA 261 (1973); cf. United States v. Skidmore, 10 IBLA 322 (1973). A proper charge would have been that the "land is not being used or occupied" for mining or milling purposes. See 30 U.S.C. § 42 (1970).

Where a government contest complaint against mining claims contains charges which, if proved, would render the claims invalid, and the contestee fails to file a timely answer to the complaint in accordance with Departmental regulations, the allegations of the complaint will be taken as admitted by the contestee and the claims are properly declared null and void. United States v. Smith, 67 I.D. 311 (1960). This rule was recently reiterated in United States v. Smith, 14 IBLA 309, 311 (1974), citing United States v. Sainberg, 5 IBLA 270 (1972), aff'd, Civil No. 72-217 (D. Ariz., Sept. 10, 1973). The same result obtains where there has been a failure to answer timely a contest complaint charging invalidity of a millsite, United States v. Storer, 3 IBLA 151 (1971). However, if the land is open to the operation of the mining laws, a new millsite can be located.

Contestee should not be held in default for failure to file a timely answer to the contest complaint which was officially served her in this case, because she had already made an adequate response to a similar complaint served upon her grantor, who gave her his copy.

The records of Inyo County, California, indicated that the Boulder Hill Millsite was held by Robert Raymond Picard. Contest No. CA 709 was initiated by the issuance of a complaint on November 1, 1973, charging that, "The land within the millsite claim is not being used for mining or milling purposes." This complaint was duly served on Picard on November 7, 1973. However, Picard had conveyed the claim to Dianne Gibson. Accordingly, upon his receipt of the contest complaint, Picard did two things. He sent the complaint to Dianne Gibson, and he wrote a letter to the BLM's California State Office, received there on November 9, 1973, at 10:00 a.m., advising that his interest in the claim had been conveyed to Dianne Gibson, whose address he supplied.

Upon her receipt of the complaint from Picard, Ms. Gibson wrote a response to the complaint, received November 28, 1973, at 9:11 a.m., by the California State Office, in which she stated

that she had just acquired the Boulder Hill Millsite claim that month (November 1973), that she was preparing to set up a mill to concentrate ore, that she had the backing of a mining company, and that she expected the mill to be in operation in January. She also requested another examination of the claim.

As previously indicated this answer was received in the State Office on November 28, 1973, at 9:11 a.m. That same day the State Office initiated a new contest action (CA 811) against the claim and mailed a copy of the complaint to appellant. The second complaint was identical in every respect to the previous one except for the contest number, date, and the fact that the name Dianne Gibson was substituted for that of Robert Raymond Picard.

Appellant received this complaint on December 4, 1973, just seven days after filing her answer to the earlier complaint. She did not make any further answer, apparently believing that she had already made an appropriate response. After the expiration of 30 days, the State Office issued its decision of January 10, 1974, holding the claim null and void on the ground that her failure to answer the second complaint constituted an admission of the charge.

There was no need for the Bureau to initiate a new contest action and thereby treat the appellant's answer as a meaningless scrap of paper. The complaint in the original contest (CA 709) could, and should, have been amended to show the name of the new claimant. This has been done many times in the past without dismissing the original contest and initiating a new one, as was done in this instance.

At the very least the State Office should have advised Ms. Gibson that the answer which she had filed that very day was unacceptable to respond to the new complaint. No one could reasonably expect her to compare the contest numbers and deduce from the fact that because the numbers were different she was obliged to sit down and write a duplicate of the letter which she had just delivered to the same office responding to the same charge.

If technicalities are to be invoked and relied upon, we have observed a few in this record which should be sufficient to nullify this whole process.

The State Office decision of January 10, 1974, cites Section 1852.1-6, Title 43, Code of Federal Regulations, as its authority for holding the claim null and void. There was no such section in the regulations in 1974, nor was there any such section in 1973 or in 1972. It is necessary to go back to the 1971 edition

of Title 43 in order to find a regulation codified under that number. Therefore, the regulation cited is not proper authority for the action taken by the State Office.

Further, the charge contained in both of the contest complaints is inadequate to result in nullification of the claim, even if the charge is admitted. The charge merely alleges that the claim "is not being used for mining or milling purposes," but the statute provides that nonmineral land "used or occupied" for mining and milling purposes may entitle the claimant to receive a patent. It is therefore incumbent on contestant to allege and prove both that the claim is neither used nor occupied for such purposes, and this it has failed to do. An improper charge against a mill-site claim will not support a holding that the claim is invalid. See United States v. Northwest Mine & Milling Inc., supra. But see also United States v. Cuneo, concurring opinion, 15 IBLA 304, 330, 81 I.D. , (1974).

Finally, because of the nature of the action, once Ms. Gibson had received a copy of the complaint in Contest No. CA 709, and had responded thereto, acknowledging her receipt of the complaint, admitting her ownership of the claim and answering the charge, it was unnecessary to issue any new complaint and serve her with a copy. A government contest of a claim under the mining laws is an action in rem or quasi in rem, and not an action in personam. Solicitor's Opinion, M-36616 (May 12, 1961). A proceeding in rem is one taken directly against property, and has for its object the disposition of property, without reference to the title of the individual claimants. Therefore, when Ms. Gibson asserted ownership of the res, acknowledged service, and filed her answer, she had, in effect, made herself a party to the contest proceeding and was thereby entitled to the benefits of due process afforded by the Administrative Procedure Act, including a hearing of the case on its merits. It was not necessary to initiate a new action for the sole purpose of naming her personally in the process, as would have been required if the action was in personam. See Pennoyer v. Neff, 95 U.S. 714 (1877). Therefore, the initiation of Contest No. CA 811 was superfluous, and appellant, having entered a proper appearance in Contest No. CA 709 had a right to be heard.

We therefore conclude that the decision of January 10, 1974, should be properly set aside.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded for appropriate consideration.

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Frederick Fishman
Administrative Judge

I concur:

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Edward W. Stuebing
Administrative Judge

I concur in the result:

_____
Douglas E. Henriques
Administrative Judge